82-1218

No.

In the Supreme Court of the United States

October Term, 1982

FLOWERS INDUSTRIES, INC., JERRY KRALIS, AND KRALIS BROS. FOODS, INC.,
Petitioners,

vs.

PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an appeal taken 87 days after entry of an order of dismissal is timely and within the jurisdiction of the Court of Appeals, the district court having refused to consider plaintiffs' Rule 59 newly discovered evidence motion on its merits and having refused to adjudge the motion because it was legally deficient.

2. Whether a legally deficient Rule 59 motion, improperly made and resting upon grounds either not sufficiently stated or for which no proof was offered, can extend the time for taking an appeal, irrespective of whether the district court has refused to entertain the motion or to decide it on its merits.

3. Whether a non-resident defendant, whose objection to the personal jurisdiction asserted is founded upon documentary evidence and upon affidavits, not objected to, which have been specifically described *by the Court of Appeals* as having been *"not adequately countered"* by plaintiff, is denied due process by the Court of Appeals' inexplicable reversal of the district court's order dismissing that defendant.

4. Whether, when personal jurisdiction allegations of complaint are controverted by competent affidavits of defendants and by documentary evidence, none of which is objected to, plaintiff may be deemed to have overcome such proof and to have made a *prima facie* showing of jurisdictional contact with "affidavits" which are totally silent as to any material fact establishing any jurisdictional contact and which are dismissed by the district court as "mere conclusions, unsupported by specific averments of fact."

5. Where amenability to personal jurisdiction depends totally upon whether a non-resident's *one and only*

contact with the forum State, a *single* long-distance telephone call, was or was not slanderous in its nature, the non-resident's affidavit denying that slander being uncontradicted, whether the *prima facie* showing of personal jurisdiction required of the plaintiff could possibly be made without any evidence from the other participant in the call that the one contact by phone was in fact slanderous in its quality and nature?

6. Whether due process contemplates that even so modest a burden of proof as a *prima facie* showing of personal jurisdiction can be met by affidavits, which are duly objected to, are at most conjecture, hearsay, or are subscribed by one permanently incompetent to testify under state law, and which affidavits have been totally rejected by the district court as being "mere conclusions, unsupported by specific averments of fact."

7. Whether the Court of Appeals is at liberty to disregard the district court's own evaluation of the plaintiffs' affidavits, to ignore those affidavits' defects when they are raised on appeal and to furnish by assumption, speculation or baseless inference that essential, material jurisdictional fact which plaintiff never attempted to prove in the district court.

8. Whether, though a corporate agent might be personally *liable* for an alleged tort committed in his corporate role, that corporate agent can, consistent with due process, be held personally *amenable,* as a non-resident, to the jurisdiction of the forum State, where that agent has had contact with the forum only by virtue of his act as a fiduciary of the corporation, has acted not for his own benefit but for that of his corporate employer, that corporation being a real entity and not a mere shell, the agent having no stock ownership interest therein.

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The petitioners Flowers Industries, Inc., Jerry Kralis and Kralis Bros. Foods, Inc. pray respectfully that a writ of certiorari issue to review the order denying petitioners' motion to docket and dismiss the appeal in the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 10, 1982, and further, to review the judgment and opinion of said court entered in this proceeding on September 22, 1982.

OPINION BELOW

The order of the Court of Appeals denying the motion to docket and dismiss the appeal as untimely was not reported but appears in the Appendix hereto. The subsequent judgment and opinion of the Court of Appeals is reported at 688 Federal Reporter, Second Series, at page 328. The memorandum order of the United States District Court for the Northern District of Mississippi was not reported but appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 22, 1982. A timely petition for rehearing was denied on October 22, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Petitioners argue that the assertion of personal jurisdiction over them, without any attempt to make a *prima facie* factual showing that their *one "contact"* by a long-distance phone call from Indiana to the forum State was slanderous in quality and nature and that the civil action arose from that *one contact*, denies to them the rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to-wit:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

Jurisdiction was invoked under 28 U.S.C. §1332 in a suit demanding $81,000,000.00 for Mott's, Inc., the world's largest fowl processor, and for its chairman of the board and majority stockholder, Pete Brown, a Mississippi corporation and citizen, respectively. Flowers, a stock holding company incorporated in Georgia, and Kralis Bros., an Indiana corporation competing with plaintiffs, and Jerry Kralis, an Indiana citizen and president of the latter company, are petitioners here.

In 1973, plaintiff Brown was indicted on ten felony charges of perjury in swearing to false and fraudulent tax returns. He pled guilty, was fined the maximum, and sentenced to three years in prison.[1] This conviction was raised in the district court and Court of Appeals. By operation of Mississippi law, Brown became permanently incompetent to give sworn testimony. Miss. Code Ann. §13-1-11 (1972). See Rule 601, Federal Rules of Evidence.

In 1979, Brown and Mott's applied to U.S.D.A./FmHA for a federal loan or loan guarantee of $4,000,000.00 under the program established by 7 U.S.C. §1932. Congress provides by §1932(d)(3), and implementing regulations dictate, that the Secretary of Labor shall inquire of plaintiffs' competitors, such as Kralis Bros., about the advisability of the loan or guarantee and shall certify statutory compliance. Approval of any loan or guarantee of this magnitude can only come directly from the office of the Secretary of Agriculture in Washington, D.C.

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1. *United States v. Pete Brown*, CRW731-K, Minutes of the United States District Court for the Northern District of Mississippi, Western Division, June 25, 1973.

During this inquiry period, Kralis Bros. learned from others in the fowl processing industry that plaintiffs might be simultaneously under investigation in Mississippi for criminal alteration of exported poultry grading certificates issued by U.S.D.A. and involving sales to Jordan and the Canary Islands.[2]

Jerry Kralis called on behalf of his company, Kralis Bros., long distance from Mentone, Indiana, to Oxford, Mississippi, to inquire of the United States Attorney about whether these investigation rumors were true and about what subject was being investigated. An Assistant United States Attorney, John Hailman, confirmed to Mr. Kralis that an investigation was *in progress* but he declined to reveal the particulars because the case was being prepared for submission to the federal grand jury. That Mr. Kralis made only this lawful inquiry is not contradicted by any proof submitted into the record. Defendants maintained below that Mr. Kralis in so doing merely availed himself of privileges, benefits, and protections afforded by *federal* law, not *Mississippi* law.

This *single* long-distance phone call to the federal building at Oxford is the *sole jurisdictional contact alleged* between Mississippi and any of the three petitioners. Brown was not a party to the call and the Court of Appeals noted correctly that only petitioner Kralis or Mr. Hailman could know the quality or nature of the single phone call. Plaintiffs did not offer Hailman's testimony to substantiate the charge that this one call had jurisdictional implications.

The complaint alleged in conclusory fashion that *U.S.D.A./FmHA declined* to loan or guarantee Brown's

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2. U.S.D.A. investigations numbers Hq 3320-1 and Hq 3320-2.

and Mott's $4,000,000.00 application because Jerry Kralis allegedly slandered plaintiffs during that *one call to an Assistant U. S. Attorney* in Mississippi. By this alleged slander, petitioners are supposed to have injured plaintiffs' reputations and interfered with prospective, unspecified business relations with unnamed persons, i.e., deprived plaintiffs of the use of the money to be borrowed, repayment of which would be secured by the U. S. Treasury.

There are no allegations that the official who acted for U.S.D.A./FmHA in denying the application was privy to what allegedly or actually passed between Mr. Kralis and Mr. Hailman and no evidence tending to show or from which it can be inferred reasonably that U.S.D.A./FmHA did not act properly in denying the application or that U.S.D.A./FmHA was *unaware of its own participation* in these investigations while the plaintiffs' application was pending. Long-arm process was used for a tort "committed in part" in Mississippi, Miss. Code Ann. §13-3-57 (1972).

In separate answers, petitioners admitted that Mr. Kralis made a call[3] but denied any wrongdoing and duly moved for dismissal under Fed.R.Civ.P., 12(b)(2). All other jurisdiction allegations were denied.

A nine-month period for discovery was ordered but plaintiffs conducted no discovery at all.

The motion to dismiss was supported by documentary evidence[4] and by five affidavits, all relevant and based

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3. But for Mr. Kralis' admission of the fact of the one call itself, there would be no proof of record of *any* contact with Mississippi, of whatever character, since plaintiffs did not attempt to prove even that the call was made.

4. The Fifth Circuit incorrectly stated that the motion was based upon affidavits *only*. The district court's memorandum order speaks at length to the defendants' documents.

upon personal knowledge. Mr. Kralis stated under oath that he slandered no one, but merely made a lawful inquiry of the U. S. Attorney's subaltern about a matter of legitimate public concern. Plaintiffs posed no objections to these affidavits or documents.

Plaintiffs attempted to counter with four affidavits which were duly objected to; two were expressly based on hearsay, given upon information and belief only, not upon personal knowledge, and stated gross *conclusions* only. Two more affidavits, likewise conclusory, were subscribed by the incompetent Mr. Brown, who again perjured himself in these affidavits, asserting his personal knowledge, gleaned from a numbered Tupelo, Mississippi, city business permit, that petitioner Flowers was licensed to sell at retail in Tupelo, Mississippi. But Brown did not produce a copy of the license. Petitioners, however, procured these documents from the Tupelo City Clerk, offered them and positively disproved Brown's falsehood. The district court remarked that this one Tupelo license allegation, though shown false, was the *only* positive fact averred by plaintiffs, the rest being mere conclusions.

Since plaintiffs never contacted Mr. Hailman and did not offer his affidavit or deposition, no proof was submitted to establish that the single contact by a long-distance call imported a slander of either plaintiff.

Upon this record, the district court dismissed all three petitioners, finding that plaintiffs' affidavits were made up of:

> [M]ere conclusions, unsupported by specific averments of fact.

* * *

> . . . Thus plaintiffs have failed to prove that Defendants Flowers, Kralis Foods and Jerome Kralis have purposefully availed themselves of any benefits, privleges, or protections afforded by the State of Mississippi. In light of the facts set out above, defendants seek dismissal of this cause on the grounds that there exist no "minimum contacts" between any of the three defendants and Mississippi, the forum state, ... We agree.[5]

A Rule 59 motion predicated upon "newly discovered evidence" (purporting to show *one* petitioner's alleged *out-of-state* business dealings with another Mississippi corporation many years before, but actually showing only the out-of-state dealings of a *non-party*, a defunct corporation, formerly operated by a brother of Mr. Kralis) was filed, demanding that the dismissal be vacated. However, plaintiffs twice failed, both in the motion and again after pointed objection to the motion, to allege or to prove that they had been duly diligent in seeking and furnishing the dated, incompetent and irrelevant information submitted. The district court deemed the motion legally ineffective.

The district court therefore refused to entertain the motion to decide it on its merits, finding:

> . . . [P]laintiffs, having inadequately dealt with the "due diligence" issue, are not entitled to judgment on their motion. Because the court makes this finding, it need not reach other of defendants' seemingly meritorious objections . . . thereto.

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5. The district court *pretermitted* considering whether the call involved *Mississippi* at all, petitioners having asserted that the federal building was in a "federal enclave" within the meaning of U.S. Const. Art. I, §8, cl.17. Since that issue was not decided it was not before the Court of Appeals.

Eighty-seven days after dismissal, Brown and Mott's appealed to the United States Court of Appeals for the Fifth Circuit. Petitioners moved to docket and dismiss the appeal as untimely and outside the court's jurisdiction. That motion was summarily denied in a one-line, unpublished order.

After allowing the appeal, the Court of Appeals reversed the district court, noting (1) that, by law, plaintiffs bear the responsibility of establishing jurisdiction over non-residents, and (2) that the defendants' affidavits controverting jurisdiction necessarily overcome the allegations of the complaint, but (3) that plaintiffs' affidavits control over defendants' affidavits *when there are conflicts between the two as to the specific jurisdictional facts alleged* in such affidavits. *Though no factual conflict about the nature of the call was presented in the two sets of affidavits,* the Court of Appeals concluded that plaintiffs had made the necessary *prima facie* factual showing, with affidavits wholly condemned by the district court as containing "mere *conclusions, unsupported by specific averments of fact.*"

And, though observing that petitioners' affidavits as to jurisdiction over Flowers in particular were "not adequately countered" by plaintiffs, nevertheless the Court of Appeals allowed the *unsupported allegations of the complaint to control over Flowers' proof* by documents and affidavits, reversing Flowers' dismissal.

The Court of Appeals implicitly assumed without any proof to support the assumption, that the denial of plaintiffs' $4,000,000.00 loan guarantee application was not simply an exercise of the wide discretion conferred by Congress upon the Executive Branch to administer the FmHA's Business and Industry Loan Program. In short, this

unwarranted assumption makes the federal government's presumptively correct refusal to guarantee a $4,000,000.00 loan to an ex-convict and his closely held corporation into an incident of "legal injury," antecedent to which the Court of Appeals has further assumed, for jurisdictional purposes, there must have been some wrongful, causative act, though plaintiffs failed utterly to offer the slightest factual proof from Mr. Hailman that the single long-distance telephone call to Mississippi was slanderous in quality and nature and amounted to such an act. The "phone call" cases relied on by the Court of Appeals are no authority for its reversal, since none of those decisions lack competent showings of the tortious quality and nature of the calls made.

REASONS FOR GRANTING THE WRIT

1. The Judgment Of The Court Of Appeals Conflicts Directly With Prior Decisions Of The Supreme Court Of The United States And The Supreme Court Of The State Of Mississippi.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980), this Court states that:

> . . . [F]*oreseeability* (of injury in the forum) *alone* has *never* been a sufficient bench mark for personal jurisdiction under the Due Process Clause.

(emphasis, parenthetical supplied). Yet the Fifth Circuit, after assuming *without proof* that the single contact with the forum by long-distance call was slanderous in nature and quality,[6] predicates jurisdiction upon the observation that:

> . . . The *injurious effect* of the tort, if one was committed, *fell in Mississippi*, which the *defendant could easily have foreseen.*

Appendix pp.22-23 (emphasis supplied). The Fifth Circuit then immediately fell to weighing the *forum non conveniens* considerations, again ignoring *World-Wide Volkswagen* which teaches:

> . . . Even if the defendant would suffer minimal or no inconvenience for being forced to litigate before the tribunals of another State, even if the forum State has a strong interest in applying its laws to the controversy; even if the forum State is the most convenient

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6. See discussion *infra* of cases requiring that "quality and nature" of the contact be addressed, especially when the contacts are few in number. A "one contact" case draws the "quality" issue into very sharp focus.

> location for litigation, the Due Process Clause, acting as an instrument of interstate federalism may sometimes act to divest the State of its power to render a valid judgment.

Id., at p.294.

Of course, in the instant case, the Fifth Circuit wrongly attributed to Mississippi a jurisdictional interest[7] in this long-distance alleged defamation which Mississippi itself, does not claim and has in decision repudiated. Appendix p.24. In *Breckenridge v. Time, Inc.*, 179 So.2d 781 (Miss. 1965), a defamation uttered outside Mississippi but published within the State was declared by the Mississippi Supreme Court to be beyond the reach of a court sitting in Mississippi, such an act not amounting to a purposeful invocation of the benefits of Mississippi law. The Fifth Circuit itself has remarked, in *Edwards v. Associated Press*, 512 F.2d 258, 262 (5th Cir. 1975), that irrespective of whether it is viewed as a due process case or as an interpretation of Mississippi's long-arm statute, *Breckenridge* showed that a defamation uttered from outside Mississippi was neither a purposeful availing of the benefits, etc. of Mississippi law nor within the long-arm jurisdiction of a Mississippi court. *Breckenridge* has not been overruled and is binding on the court below under *Erie*. The *Temco* case relied upon by the Court of Appeals is a products liability case, not on point, and implicitly overruled by *World-Wide Volkswagen*. See Appendix p.21.

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7. It being merely *fortuitous* that the U. S. Attorney investigating plaintiffs was situated in Oxford, Mississippi, rather than in Washington or elsewhere. Mississippi's *interest* seems particularly dubious when we observe that the caller was talking to a *federal* official, in a *federal* enclave, about the pendency of *federal* investigations of crimes in *international* commerce, possibly committed by applicants for a *federal* loan guarantee by the *federal* government, one of the applicants being a *federal* ex-convict.

Every personal jurisdiction—due process decision of the Supreme Court since *International Shoe* has stressed that the *quality and nature* of the non-resident's contacts with the forum are crucial in determining whether the assertion of personal jurisdiction will offend due process. *See, International Shoe Company v. State of Washington,* 326 U.S. 310, 319 (1945); *Hanson v. Denkla,* 357 U.S. 235, 253 (1958); *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977); *Kulko v. California Superior Court,* 436 U.S. 84, 97-98 (1978); *World-Wide Volkswagen, supra,* at p.297. Where the contacts are literally minimal, this consideration is paramount.

If the long-distance call is not shown *prima facie* to be of a slanderous nature, personal jurisdiction has to fail, yielding to due process. Indeed, the Mississippi long-arm process itself will fail if this fundamental proof that a tort was committed cannot be shown at least *prima facie.* Any other approach would negate the salutary purpose of Rule 12 to protect all non-residents from unwarranted impositions of personal jursidiction which violate due process.

It follows necessarily that, *since plaintiffs make no effort* to offer competent proof from the other party to the call as to the nature and quality of the defendant's long-distance conversation, plaintiffs can scarcely be said to have attempted or made the *prima facie* showing of tortious and therefore jurisdictional contact with the forum State. This is not an onerous burden for the plaintiff invoking jurisdiction on these facts since, if one cannot make even this modest *prima facie* showing in opposition to a motion to dismiss after nine months of litigation, what reasonable likelihood exists that plaintiff could have adduced any such testimony at trial?

2. The Opinion And Judgment Below Violate State Evidentiary Principles Which Are Controlling Under Erie And The Federal Rules Of Evidence.

In *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959), this Court announced that local rules of law, placing and defining the burden of proof and defining presumptions and their effect confer substantive rights which must be respected by federal courts under *Erie*. Rules 302 and 601, Federal Rules of Evidence, speak to or touch upon this principle.

A number of extant rules and presumptions arising under Mississippi law, all virtually ignored by the Fifth Circuit, militate for the reinstatement of the district court's dismissal. For instance, Mr. Kralis was required to go no further to rebut jurisdiction that to account for *his own* knowledge of the call. The burden to contradict that with Mr. Hailman's affidavit, if he were inclined to contradict, was placed upon plaintiffs. *Price v. Haney*, 164 So. 590 (Miss. 1935).

Further, though plaintiffs' complaint inferentially argues that U.S.D.A. *erred* in not granting their loan application, a strong positive presumption *to the contrary* arises under Mississippi and federal case decisions. *Martinson v. City of Jackson*, 215 So.2d 414 (Miss. 1968); *Norris v. United States*, 257 U.S. 77 (1921); *United States v. Chemical Foundation, Inc.*, 271 U.S. 1 (1926); *United States v. Rock Royal Cooperative*, 307 U.S. 533 (1939). Ironically, plaintiffs want to hold petitioners accountable to them *in Mississippi* for what the federal government decided *in Washington* to do about a loan guarantee application which only the Secretary of Agriculture or his deputy could authorize. Yet U.S.D.A. is not sued for the exercise of its executive power, though it alone is accountable for an arbitrary exercise of this power.

Moreover, though the Fifth Circuit is ready enough to assume *prima facie* that a slander was uttered, without the slightest proof to support that assumption, Mississippi law inveighs against that assumption and presumes at law that all persons, including non-residents, have: acted lawfully, *Mississippi Power Co. v. Sellers,* 133 So. 594 (Miss. 1931); in accordance with one's *legal duties, Wilkie v. Collins,* 48 Miss. 493 (1873); honestly and upon correct motives, *Wherry v. Latimer,* 103 Miss. 524 (1913); and have done right by others, not a wrong, *Orgill Bros. v. Perry,* 128 So. 755 (Miss. 1930).

This *prima facie* presumption of "right-doing" is not a foreign concept in this Court. *United States v. De la Maza Arredondo,* 31 U.S. (6 Pet.) 691 (1832); *Owings v. Hull,* 34 U.S. (9 Pet.) 607 (1835); *Mitchell v. United States,* 88 U.S. (21 Wall.) 350 (1874). There are no facts of record to which this presumption could yield.

Mr. Brown is conclusively presumed incompetent to give truthful testimony under state law, Miss. Code Ann. §13-1-11 (1972), and characteristically stooped to injecting positive falsehood into the proceedings below in the "Tupelo license" incident. Yet the Fifth Circuit has set great store by his affidavits, allowing his conclusions and speculations to overcome not only competent, uncontradicted affidavits on the material jurisdiction fact but *the very official documents whose content Brown affirmatively misrepresented.* Appendix p.21.

Clearly, the Fifth Circuit's judgment rewards falsehood and frustrates justice utterly. Plaintiffs showed no colorable claim to the long-arm jurisdiction of the district court. The federal and state "negative inference" rules speak directly to their failure to offer any proof showing that the one call to Mississippi was slanderous. We do not ask that the evidence opposing petitioners'

motion be reweighed; we maintain that the plaintiffs produced nothing which a court could accept as evidence and undertake to weigh.

3. The Decision Below Ignores The Absence Of A Prima Facie Showing Of Jurisdictional Fact And Negates The Salutary Purpose Of Fed.R.Civ.P. 12(b)(2).

The decision in *Texaco Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), observes that a "prima facie" case signifies having produced *enough evidence* to permit the trier of fact to infer the fact at issue. The fact at issue *in the pleadings* is whether a slander occurred in that single phone call. But on the proof adduced, *no issue appears* because defendants' affidavits establishing the innocent, inquisitive quality and nature of the call are not contradicted on that point.

While the law presumes that damage necessarily flows *from* a slander, the law has never presumed that an incident or an occurrence in time can be taken as a manifestation of legal injury so that an *unproven* act of wrongdoing may be retroactively inferred to have occurred and given rise to the "assumed injury." That kind of reasoning is implicit in a reversal of the district court upon the record there made.

The *denial* of plaintiff's loan application *by U.S.D.A.* may or may not be an incident of legal injury but if it is injury, still no proof to that effect appears of record. Is it not wholly indefensible for a court to assume first that the denial is an injury and then to assume that this one phone call to a remote office of a separate department of the federal government (which has nothing to do with approving U.S.D.A. loan applications) included an untrue

statement about the applicant's character and then to return circuitously to the "injury" with the additional assumption that the assumed slander *caused* the assumed injury? All of this is done by the Court of Appeals without the slightest evidentiary backing.

If a plaintiff can completely shirk his burden of material proof of jurisdiction contacts, or can carry that burden with conclusions, incompetent affidavits, and rank speculation about what two other people said to each other in a private phone call, and if a court will support this default in proof and join in by indulging impermissible assumptions, baseless inferences and ignoring the extant positive rules of law, what prospect has a nonresident of successfully defeating an improper assertion of jurisdiction over his person? Rule 12 defenses become meaningless words in such a climate.

A *prima facie* burden is the most modest of evidentiary thresholds. The due process protection afforded by the 14th Amendment should not be held susceptible to the indolence, prevarication, and illogic of a plaintiff who will not meet the burden fairly and address the single material fact which is crucial to the maintenance of jurisdiction.

4. The Decision To Allow The Appeal After Jurisdiction Over It Was Lost Conflicts Directly With A Prior Decision Of The Supreme Court.

In *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U.S. 131 (1937), Mr. Justice Roberts stated:

> . . . The granting of a rehearing is within the court's sound discretion, and *a refusal to entertain a motion therefor*, or the refusal of the motion, if entertained, *is not the subject of appeal. A defeated party who*

> *applies for a rehearing and does not appeal* from the judgment or decree *within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal.*

Id., at p. 137 (emphasis supplied).

In 1958, the Fifth Circuit, cited *Wayne United* on this point in *Ribaudo v. Citizens National Bank of Orlando*, 261 F.2d 929, 932, remarking:

> The key is that the court *must "entertain"* the petition, and this seems to be that it *must consider it on its merits*. . . . If it is so treated (entertained), the result (appealability being extended) is not altered by the fact that the decision on rehearing is the same as the initial order.

(Emphasis, parentheticals supplied).

The district court refused to entertain plaintiffs' application to rehear the dismissal motion or to decide the factual sufficiency of the "newly discovered evidence" to bring about a reversal of the original dismissal, because plaintiffs had twice failed to lay the due diligence legal and factual predicate for getting their new evidence considered. Appendix p.7. The merits of that evidence were not addressed by the district court and the import of those facts was not before the Court of Appeals after the appeal was allowed.

This refusal to entertain the Rule 59 motion kept the time within which to appeal from being tolled. Plaintiffs took the risk mentioned by Mr. Justice Roberts and lost.

To permit an appeal noticed 87 days after the order of dismissal, 57 days after plaintiffs had lost their right to appeal, was an impermissible extension of the limited

appellate jurisdiction vested in the courts of appeals. So wide a departure from the accepted and usual course of judicial proceedings to accept an untimely appeal calls for a corrective exercise of the supervisory power of the Supreme Court. Petitioners were deprived thereby of the salutary effect of the dismissal order.

5. The Decision Below Allowing The Untimely Appeal Conflicts With The Decisions Of Other Courts Of Appeals Concerning The Effect Of An Improperly Made Rule 59 Motion To Toll The Running Of The Time For Taking An Appeal.

Quite apart from the jurisdictional effect of the district court's *refusal to consider* plaintiffs' "newly discovered evidence" on its merits, there is an inherent, jurisdictional problem posed by allowing a *defectively made* Rule 59 motion to toll the running of appeal time. See Appendix pp.8-10. The Fifth Circuit had indicated previously that such motions were to have no tolling effect; allowing the plaintiffs' appeal marked a change of decision and principle now inconsistent with that held in other circuits. See Appendix p.11.

The Seventh Circuit opinion in *Fine v. Paramount Pictures, Inc.*, 181 F.2d 300 (7th Cir. 1950) holds that such motions are ineffective to extend the time for appeal and a legal nullity if the motion does not sufficiently state the ground upon which it depends.[8] The Fifth Circuit previously had relied upon *Fine* as controlling authority. *Virginia Land Co. v. Miami Shipbuilding Co.*, 201 F.2d 506 (5th Cir. 1953).

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8. The Fifth Circuit has customarily viewed the ground of "newly discovered evidence" as specifically requiring the predicate showing of movant's "due diligence." *See, e.g., Owens v. International Paper Co.*, 528 F.2d 606, 611 (5th Cir. 1976); *Lloyd v. Gill*, 406 F.2d 585, 587 (5th Cir. 1969).

The Tenth Circuit likewise holds that the stating of a ground *pro forma*, when moving to reopen, makes the motion so essentially defective as to deprive the district court of its discretionary jurisdiction even to entertain the motion. *Marshall's U.S. Auto Supply, Inc. v. Ashman*, 111 F.2d 140, 141-142 (10th Cir. 1940); *accord, National Farmers Union Automobile & Casualty Co. v. Wood*, 207 F.2d 659 (10th Cir. 1953).

On the other hand, the Ninth Circuit, now apparently joined by the Fifth, allows the appeal as long as the motion was timely filed, even if defectively made. *Yanow v. Weyerhauser S. S. Co.*, 274 F.2d 274 (9th Cir. 1959). And the Sixth Circuit pursues a literal approach to F.R.A.P. 4(a), likewise focusing upon the act of filing. *Keohane v. Swarco*, 320 F.2d 429 (6th Cir. 1963).

In an era of limited judicial resources, understaffed courts, and overloaded dockets, these conflicts become of greater importance. The unwarranted delaying of appeals, the haphazard presentation of ill-conceived attempts to disturb well-founded orders, and the tardy submission of dubious evidence do not contribute to an efficient, judicious administration of justice or the courts established to dispense it. Stretching the time within which to appeal, while litigants engage in unwarranted motions consumptive of court and private resources, serves no legitimate objective of the courts, the litigants, or the public. Rule 60, Fed.R.Civ.P., opens an avenue for post-judgment motions without interrupting the flow of appeal time. But Rule 59 should not be so abused.

6. The Decision Below Is Fundamentally Unfair In Subjecting A Corporate Agent To Personal Jurisdiction Amenability For Alleged Acts Done Solely On Behalf Of His Corporate Employer.

World-Wide Volkswagen, supra, holds that the root issue in due process inquiries is whether one may reason-

ably anticipate that his acts abroad may cause him to be haled into court in a distant forum. In the opinion below, the Fifth Circuit relies in part (Appendix p.20) upon *Marine Midland Bank v. Miller*, 664 F.2d 899 (2nd Cir. 1981) which holds, *inter alia*, that personal *liability* and personal jurisdiction *amenability* are not synonymous issues. The case notes that it may be fundamentally unfair to hold a corporate employee, like Mr. Kralis, personally amenable to long-arm process, where his acts arise from a faithful pursuit of his employer's interests, not his own, and where that corporation is not a "mere shell" such that the employee might properly be deemed to be acting in his own interest.

The record made below clearly established all of these elements in Mr. Kralis' favor. Though the record fails utterly to show wherein he did anything wrong, the record does show successfully that what he did do was as a salaried employee for his employer, an adequately capitalized, formally run entity in which Mr. Kralis had no stock ownership interest.

The traditional notions of fair play, to which *International Shoe* and its progeny pay tribute, are offended by the maintenance of personal jurisdiction over Mr. Kralis, compelling him to participate personally in litigation in distant Oxford, Mississippi.[9] A single innocent inquiry of a public officer on behalf of one's employer, made by a long-distance telephone call, is not such an act as one would reasonably expect to cause a corporate employee to be haled into Mississippi to answer and defend a baseless $81,000,000.00 suit.

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9. Though he was president of Kralis Bros. when suit commenced, Mr. Kralis retired as president of the company on December 31, 1982.

CONCLUSION

Petitioners pray respectfully that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit and that the Court simultaneously (1) summarily reverse the denial of petitioners' motion to docket and dismiss the appeal below as untimely and (2) reverse the judgment and opinion entered in the Court of Appeals as being insupportable upon the record or grant such other hearing and relief as the record requires.

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